15688

No. ~~15689~~

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDDIE RENA HAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

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Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty of Counts Three and Four of a five-count indictment which named Edward Burton as a co-defendant [T. 19].[1] Count Three charged appellant with the sale and facilitation of sale of approximately 283 grains of heroin on or about September 11, 1956, and Count Four charged appellant with the sale and facilitation of sale of approximately 223 grains of heroin on or about September 26, 1956 [T. 3, 4]. Both

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[1]The abbreviation "T" refers to the Clerk's "Transcript of Record."

of said counts are charged to be offenses in violation of Title 21, United States Code, Section 174.

The violations are alleged to have occurred in Los Angeles County, California, and within the Central Division of the Southern District of California.

Counts One and Two of said indictment were dismissed by appellee at the outset of trial [T. 7], and appellant was found not guilty of Count Five by the jury [T. 5].

The jurisdiction of the District Court was based upon Title 18, United States Code, Section 3231. This court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Title 28, United States Code, Sections 1291 and 1294.

Statement of the Case.

On September 11, 1956, Deputy Sheriff William R. Farrington, in the presence of other narcotics officers, made a phone call to Edward Burton, at the latter's home, and made arrangements to purchase one ounce of heroin from Burton at France's Drive-In in Los Angeles at 7:00 P.M. [R. 124, 125].[2] Farrington had had prior dealings with Burton whereby he had been able to purchase narcotics from him [R. 332]. Pursuant to the phone call Farrington, after apprising the other officers of the arrangements, met Burton at the drive-in at 7:10 P.M. Under the surveillance of Deputy Sheriff Algy F. Landry and Federal Agent Malcolm P. Richards [R.

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[2]The abbreviation "R" refers to the "Reporter's Transcript of Proceedings."

178, 179, 250], Burton entered Farrington's car, received $300 from the latter, and stated that he would return in about twenty minutes. Burton then left the area by car and was followed by Landry and another officer to appellant's home at 5226 West 20th Street, Los Angeles. Richards remained with Farrington at the drive-in. At appellant's home Burton inquired of appellant whether she could obtain an ounce of heroin. Appellant stated that she could, made a phone call, and left with Burton in appellant's car [R. 70]. Landry followed them but lost appellant's car in traffic. Appellant drove to Adams Boulevard, temporarily dropped Burton off, picked him up again, and then proceeded further down Adams Boulevard where she alighted from the car and picked up a package [R. 70-72]. During this time, Burton turned over part of the money received from Farrington to appellant [R. 73, 74].[3] Appellant then drove back to her home where she and Burton separated. Burton returned to France's Drive-In at about 8:55 P.M. and, again under the surveillance of officers, gave the package which appellant had picked up to Farrington [R. 73]. Said package consisted of a glassine bag containing 283 grains of heroin which the officers immediately marked for identification [R. 126, 195, 197].

Farrington again contacted Burton by telephone on September 24, 1956 and arranged to meet him at a

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[3]Page 74, line 1, of Reporter's Transcript of Proceedings should read "Hamer" in lieu of "him". See Reporter's correcting affidavit in Appendix.

Thrifty Drug Store in the Venice area to consummate another purchase of heroin [R. 127]. Burton arrived at about 11:35 A.M. and advised Farrington to follow him to the former's home. Farrington complied, and under the surveillance of following officers, went to Burton's home at 1669 Indiana Street in Venice [R. 127, 183]. In the house, Farrington stated that he wanted an ounce of heroin whereupon Burton made a phone call to appellant saying "Hello Eddie, I want one" and inquiring if she "could get it" [R. 75, 128, 169]. Appellant informed Burton that she didn't know but would try [R. 75]. Burton then informed Farrington to meet him at the aforementioned drive-in at 2:30 P.M. and Farrington thereupon gave Burton $300 in cash which had been previously dusted with a fluorescent powder and whose serial numbers the narcotic officers had previously recorded. Farrington left, rejoining the surveilling officers, and after advising them of the situation, proceeded to the drive-in with two of the officers while Richards and Deputy Sheriff Arthur Gillette remained in the vicinity of Burton's home. Burton was observed by Richards to leave his house at about 1:30 P.M. and was followed by the latter to appellant's home. Appellant was present therein and after informing Burton that she would try to locate the "fellow" made a phone call but "couldn't get in touch with him" [R. 75, 76]. Burton left at about 2:30 P.M. and, under Richard's surveillance, proceeded to the drive-in where he informed Farrington that it would be about twenty minutes. Burton then returned to appellant's home, under the surveillance of Richards and Landry. At about 3:00 P.M. Burton, accompanied by appellant and Loretta Rainey, were observed by the officers to leave appellant's home and drive off in Burton's

car. Richards followed them and observed appellant leave the car on South Avalon Boulevard and engage a man in conversation. At 43rd Street and Central Avenue, appellant again briefly left and upon her return informed Burton that she still couldn't find "him" [R. 77]. The group then continued to 42nd Place where Richard observed appellant enter her aunt's house at 856 E. 42nd Place.

Upon returning in 10 minutes appellant advised Burton that she would "give him about 30 minutes" and "we will go over on 35th and Normandie" [R. 79]. In proceeding to said location, Burton stopped and went into an auto spare parts shop on Adair and St. Pedro Streets. There is no evidence in the record supporting appellant's statement on page 9 of her opening brief that Burton had a package when returning to the car [R. 291, 316, 413]. At 35th Street and Normandie Avenue appellant was observed by Burton (Richards in the interim having lost Burton's car while attempting to follow from the auto shop) to go to the corner and return with a package [R. 80]. After another stop at Rainey's house the group proceeded to appellant's home whereupon Burton left for the drive-in. In the meantime, he had given appellant some of the marked money received from Farrington [R. 82]. Arriving at the drive-in at about 5:15 P.M., Burton gave Farrington the package which appellant had picked up at 35th Street and Normandie Avenue [R. 80, 81], and was placed under arrest by Farrington, Landry, and the other surveilling officers. Said package consisted of a glassine bag containing 222 grains of heroin which was marked for identification by the officers [R. 129, 198, 199]. They found $35.00 of the marked money on Burton's person and he at that time

confirmed to Farrington, Landry, Richards, and the other officers that he had given the balance of the marked money to appellant and that the narcotics previously delivered to Farrington had, on each occasion, been obtained from appellant [R. 331, 335, 336]. Officer Landry, accompanied by other officers, proceeded to appellant's home and arrived at 5:40 P.M. just as appellant and Rainey were leaving the house. As appellant and Rainey were coming down the private walk of the premises which led to the street, and before they reached the public sidewalk, the officers stopped them [R. 334, 335, 214]. Landry exhibited his credentials to appellant, advised her that she was under arrest for violation of the federal narcotic laws, and informed her of constitutional rights [R. 214, 215]. Rainey was not placed under arrest [R. 216]. Upon being informed of her arrest, appellant told the officers to come into her house because she didn't "want the neighbors to know anything." [R. 185, 399]. Appellant then opened her front door, which was apparently locked, and entered her home followed by the officers [R. 185]. Thereupon appellant drew the window blinds and, in response to Landry's query whether she had any money on her person, stated that she did, and emptied the contents of her purse on a table. Among the contents the officers found $30.00 of the fluorescently dusted money, which a check of the serial numbers disclosed had been previously given to Burton by Farrington. Appellant's fingertips were similarly found to be fluorescent [R. 132].

After a search of the house (which is not material to the instant appeal) appellant was taken to the Federal Building in Los Angeles where, after again being advised of her constitutional rights, appellant told the officers that on September 24 she had phoned one "Roadbuddy" (later identified by appellant as William McHenry) from her aunt's home and arranged a meeting place; that she thereafter met said individual and purchased an ounce of heroin from him; and that she gave him $250 therefore but that he returned $30.00 of said sum to her [R. 206-207, 272-276].

Statutes Involved.

So far as pertinent to this appeal, Counts Three and Four were brought under Title 21, United States Code, Section 174 which in pertinent part provides:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. . . .
>
> "Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

ARGUMENT.

I.

Appellant Was Not Deprived of a Trial by an Impartial Jury.

(1) In Non-capital Offenses There Is No Constitutional Right to Advance Information About the Jury.

The basic rule relative to the selection of juries in the Federal system was expressed by the United States Supreme Court in *Pointer v. United States,* 151 U. S. 396, 39 L. Ed. 214 as follows, on pages 407, 408:

> "But Congress has not made the laws and usages relating to the designation and empanelling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. *United States v. Shackleford,* 18 How. 588; *United States v. Richardson,* 28 Fed. Rep. 61, 69. In the absence of such a rule or order, (and no such rule or order appears to have been made by the court below,) the mode of designating and empanelling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses."

The sole Congressional restriction applicable to advance service of jury lists is contained in Title 18, United States Code, Section 3432 wherein provision is made for such advance service in treason and other capital offenses.

Since its inception this statute has been uniformly construed to have no application to non-capital offenses.

United States v. Williams, Fed. Cas. No. 16709, 28 Fed. Cas. 646 (1804);

United States v. Van Duzee, 140 U. S. 169, 35 L. Ed. 399 (1890);

Shelp v. United States, 81 Fed. 694 (C. C. A. 9th, 1897);

Brown v. Johnson, 126 F. 2d 727 (C. C. A. 9th, 1942), cert. den. 63 S. Ct. 39, 317 U. S. 627.

Appellant admits that at common law foreknowledge of the jury was limited to capital offenses (Appl. Op. B. 45, 47)[4] and that there is no constitutional right to such foreknowledge (Appl. Op. B. 49). The courts are in accord (see *United States v. Van Duzee, supra*).

Accordingly, in non-capital offenses, "the jury list can't be required and need not be furnished in advance of trial" (*Hendrickson v. United States,* 249 Fed. 34 (C. C. A. 4th, 1918), at p. 35); and it has been held, in accordance with the above quoted principle of *Pointer v. United States, supra,* that the District Court has the discretionary power in non-capital cases to promulgate an order forbidding the court clerk to reveal the jury list in advance of trial to anyone but the Marshal.

Wilson v. United States, 104 F. 2d 81 (C. C. A. 5th, 1939), cert. den. 60 S. Ct. 89, 308 U. S. 574;

See:

Spivey v. United States, 100 F. 2d 181 (C. C. A. 5th, 1940), cert. den. 60 S. Ct. 1079, 310 U. S. 631.

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[4]The abbreviation "Appl. Op. B." refers to Appellant's Opening Brief.

(2) The Action of the Trial Court in Denying Appellant's Request to Personally Voir Dire the Jury Did Not Deny to Appellant Any Constitutional Rights.

The trial court made its own examination of the prospective jurors, advising them of their duties as jurors, and questioning them for possible prejudice [R. 6-15]. Although the court did not allow appellant's counsel to personally *voir dire* the jury [R. 16], the court did propound to the jury all inquiries requested by appellant [R. 16-18, 22]. At all times the court was solicitous in behalf of appellant in determining whether it had put to the jury all questions desired by her counsel [R. 18, 20, 22, 24, 32-35]. Appellant now complains that this procedure violated her constitutional rights.

This contention has been consistently held to be without merit (*Ungerleider v. United States,* 5 F. 2d 604 (C. C. A. 4th, 1925), cert. den. 269 U. S. 574; *Murphy v. United States,* 7 F. 2d 85 (C. C. A. 1st, 1925), cert. den. 46 S. Ct. 120, 269 U. S. 584; *Kurczak v. United States,* 14 F. 2d 109 (C. C. A. 6th, 1926); *Paschen v. United States,* 70 F. 2d 491 (C. C. A. 7th, 1934); *Seadlund v. United States,* 97 F. 2d 742 (C. C. A. 7th, 1938)), the courts stating that the manner in which the examination of prospective jurors is conducted rests in the discretion of the trial court.

Speak v. United States, 161 F. 2d 562 (C. C. A. 10th, 1947);

Murphy v. United States, supra.

Also see following 9th Circuit Cases:

Bradshaw v. United States, 15 F. 2d 970 (C. C. A. 9th, 1926);

Bonness v. United States, 20 F. 2d 754 (C. C. A. 9th, 1927);

Frederick v. United States, 163 F. 2d 536 (C. C. A. 9th, 1947), cert. den. 68 S. Ct. 87, 332 U. S. 772.

The procedure followed by the trial court herein is not only sanctioned by the appellate courts (see cases cited *supra*), but is expressly provided for by Rule 24(a) of the Federal Rules of Criminal Procedure.

(3) The Government's Possession of a Loose-leaf Book Containing the Names of Past Jurors in Other Cases Did Not Deprive Appellant of a Fair Trial by an Impartial Jury.

During the time that peremptory challenges were being exercised, appellant's counsel approached the bench and stated to the trial court that counsel for the Government had a loose-leaf book which he referred to in his challenging of the jury [R. 27]. After some discussion concerning same, the challenges were concluded, and thereafter appellant's counsel suggested that the trial court examine said book *in camera* [R. 47]. Said examination was made by the court whereupon the court found that the information contained therein consisted merely of impressions of a jury gained by a particular Assistant United States Attorney in court after trial of a case; that it did not consist of an advance jury list; and that nothing contained therein showed any impropriety or unfair acquirement of knowledge which in any way impaired the fair impaneling of the jury in this case [R. 277-284].

Appellant now contends, without citation of any authority in support thereof, that the Government's possession of said book created a situation of inequality which deprived appellant of a fair trial by an impartial jury.

In *Christoffel v. United States,* 171 F. 2d 1004 (C. C. A. D. C., 1948), a similar contention was made. There, defendant's counsel advised the court that the Government's counsel had additional information before him with reference to the jurors, and moved the court for a copy thereof on the grounds that he was entitled to the benefit of the same information. Counsel also moved the court to have the jury panel disqualified. In upholding the trial court's denial of said motions the appellate court stated at page 1006:

> "There is no merit in the contention that the court should have disqualified the panel or should have allowed appellant's counsel to examine the government's notes, if any, concerning it. There is no evidence, and counsel did not attempt to introduce any, that the government made any investigation, to say nothing of an improper one, of prospective jurors. Counsel's suggestion of what he thought probable is not evidence. The Sinclair case [*Sinclair v. United States*], 279 U. S. 749, 49 S. Ct. 471, 73 L. Ed. 938, 63 A. L. R. 1258, involved offensive shadowing of jurors during a trial and is plainly not in point. And the government is not required to furnish the defense with notes it may have made for use in selecting a jury."

Also see:

Best v. United States, 184 F. 2d 131 (C. C. A. 1st, 1950), cert. den. 340 U. S. 939, rehear. den. 341 U. S. 907.

In the case at bar, as pointed out by the trial court, there is also no evidence, aside from counsel's suggestion of what he thought probable, that any improper investigation of prospective jurors was made or that the jury was not impartial. On the contrary, the impartiality of the jury is evidenced by their acquittal of appellant on Count Five of the indictment [T. 5].

The adequate interrogation of prospective jurors by the trial court, in aid of appellant's exercise of challenge [R. 6-18], together with appellant's failure to utilize all available challenges, and her acceptance of the jury [R. 34], further points out the fairness of the impaneling of the jury.

II.

Appellant's Arrest and Subsequent Search Did Not Violate Her Constitutional Rights.

(1) The Search of Appellant's Person Was a Lawful Incidence of Her Legal Arrest.

Appellant admits that the search in issue is valid if incident to a lawful arrest (Appl. Op. B. 64). She further admits that, by virtue of Title 26, United States Code, Section 7607, the arrest is lawful if the arresting officer had reasonable grounds to believe that appellant had committed the offense (Appl. Op. B. 65).

The fundamental concept that the existence of probable cause is tested on the basis of information received by the arresting officers from others, as well as their own personal observations, is also not denied (Appl. Op. B. 66); and see *Brinegar v. United States,* 338 U. S. 160 (1949); *Carrol v. United States,* 267 U. S. 132 (1925); *Gilliam v. United States,* 189 F. 2d 321 (C. C. A. 6th, 1951); *United States v. Li Fat Tong,* 152 F. 2d 650 (C. C. A. 2nd, 1945).

It is submitted that in the instant case, the observations of the arresting officers, together with the information imparted to them by Burton, meets the standards of probable cause necessary to justify an arrest. Appellant apparently does not quarrel with this conclusion, but asserts that the information received from Burton must be discounted as not being reasonably trustworthy. However, this is not a case in which the officers received an uncorroborated tip from an informer whose very identity was unknown; nor do the facts present herein justify the conclusion that the arrest was based solely on mere suspicion. Appellant's citation of authority in support of these principles is therefore inapplicable.

Officer Farrington had previously dealt with Burton; and the information that the latter gave to the officers so clearly fit in with and verified their own personal observations that it constituted reasonably trustworthy information. For example, the officers' own knowledge of Burton's phone call to an "Eddie" for narcotics, and his immediate meetings with appellant Eddie Hamer after arranging narcotic sales to Farrington, were sufficient to warrant a reasonable man giving credence to Burton's admission that appellant was his source of narcotic supply. See:

United States v. Volkell, 251 F. 2d 333 (C. C. A. 2nd, 1958);

Browner v. United States, 215 F. 2d 753 (C. C. A. 6th, 1954).

With regard to appellant's contentions that the arrest was a mere pretext for the search of her home and that she did not consent to the searchs conducted therein, suffice it to say that all the evidence, including appellant's

own testimony [R. 399], clearly establishes that the arrest was consummated on the exterior premises of her home, and that the officers entered therein only at appellant's own insistence; that she told the officers to search her home before any search commenced [R. 342-343]; and that she voluntarily emptied the contents of her purse in response to Landry's query whether she had any money on her person.

III.

The Balance of Appellant's Assignments of Error Are Without Merit and Did Not Prejudice Her.

It is submitted that the balance of appellant's contentions raise no issue of merit or substance, and appellee therefore summarily answers them as follows:

(1) The contention of judicial misconduct is refuted by an examination of the record itself. Such an examination, it is submitted, would reveal that appellant's counsel invited the action of the trial court in enforcing its duty to preside over a fair and orderly trial. Accordingly, appellant cannot be heard to complain thereof. With reference to the trial court's conduct regarding the witness Burton, the court in *Tucker v. United States,* 5 F. 2d 818 (C. C. A. 8th, 1925), cited by appellant in support of her contention of misconduct (Appl. Op. B. 62), stated on page 824, relative to the Fifth Amendment, as follows:

> "There is no higher nor more important duty resting upon the courts than to see that the citizen is fully afforded the rights and immunities guaranteed to him by the Constitution."

Also see: *Gruher v. United States,* 255 Fed. 474 (C. C. A. 2nd, 1918), wherein the court commented on page 477:

> ". . . it is always the duty of a trial court to assist or direct a witness who is stumbling over a technical point. It cannot be error to ask a witness who declines to answer without his counsel being present whether he means to claim his privilege."

(2) In an attempt to bring this case within the rule of *McNabb v. United States,* 318 U. S. 332, appellant states that she was afforded no opportunity to phone her attorney or husband and that she was coerced into making her confession (Appl. Op. B. 80). Nothing in the record, aside from appellant's own self serving testimony, sustains such conclusions [R. 233, 293, 326, 327]. Nor does the record reveal any lengthy or illegal detention of appellant prior to arraignment. The record, does however, show that at the time of arrest and again at the time of interrogation appellant was advised of her right to have an attorney [R. 215, 207], and was advised to contact one [R. 148].

As this court stated in *Haines v. United States,* 188 F. 2d 546 (C. C. A. 9th, 1951), cert. den. 342 U. S. 888, at pages 552 and 553:

> "In the McNabb case, supra, 318 U. S. at page 346, 63 S. Ct. at page 615, the Court said that the mere fact that one makes a confession while in the custody of the police does not render the confession inadmissible. . . .
>
> "Incidents of the oppressive nature shown in the McNabb case are wholly absent in the instant case and its facts do not even faintly resemble the McNabb situation. . . .

"The testimony in the case at bar fails to provide even an inference that an 'illegal detention' was deliberately resorted to as a *means,* or for the *purpose* of, extorting a confession or that the confession in this case were *due* to failure promptly to take appellant before a committing magistrate. . . .

"The facts in this case clearly show that appellant made a voluntary oral confession (complete in its details) immediately after he arrived at Eliason's office on the morning of his arrest. . . .

"In the face of these impressive and convincing circumstances we are unable to conclude that we *must* hold, as a matter of law, that the *bare failure* to have appellant *immediately* arraigned after his arrest on March 3rd automatically translated the short questioning period which immediately followed his arrest into an 'illegal detention' the effect of which was to invalidate the oral confession then made. . . ."

The above cited opinion of the *Haines* decision applies with equal force to the instant case.

(3) The record does not sustain appellant's contention that her counsel was prohibited from asking questions regarding the police report. Rather it shows that counsel elected not to pursue any inquiry thereon when advised by the court that the report could go into evidence if the subject were opened up [R. 240]. Having so elected, any claim of error was waived.

(4) Examination of the record amply justifies the conclusion that, as a matter of law, the evidence was sufficient to sustain appellant's conviction.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment should be affirmed.

Respectfully submitted

LAUGHLIN E. WATERS,
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APPENDIX.

State of California, County of Los Angeles—ss.

I, the undersigned, hereby certify that:

Line 1, page 74 of the reporter's transcript in the matter of United States of America v. Edward Burton and Eddie Rena Hamer, No. 25,885, which reads:

"A. I gave part of it to him."

should read:

"A. I gave part of it to Hamer."

This correction is made pursuant to inquiry by United States Attorney as to the word "him," and it was found that my reporter's notes showed the word to be "Hamer."

IN WITNESS WHEREOF, I have hereunto subscribed my name this 15th day of April, 1958.

/s/ DON P. CRAM
Official Reporter
United States District Court

Subscribed and sworn to before me this 15th day of April, 1958.

MARIE G. ZELLNER
Notary Public in and for the State of California.